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IN THE

Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG, *Petitioner,*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND SUPPORTING BRIEF

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WAR CONTRACTS PRICE ADJUSTMENT BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petition of James B. Armstrong prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on January 17, 1952 in two renegotiation cases involving the years 1943 and 1944.

The cases were consolidated by the Court of Appeals for Appendix, briefing and argument and one opinion was rendered by the Court.

Opinions Below

The judgment, findings of fact and conclusions of law of the Tax Court are printed in the record (R. 54-73) and were reported in 15 T. C. 625. The opinion of the United States Court of Appeals has not been reported but is set forth in the record (R. 238-239).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254(1).

Statute Involved

The statute involved is the Renegotiation Act of 1943—Act of February 25, 1944, c. 63, Title VII, sec. 701(b), 58 Stat. 78, and the pertinent provisions thereof are printed in Appendix A annexed to this petition.

Question Presented

The question presented turns on the interpretation of subsection 403(a)(5)(B) of the Renegotiation Act of 1943: Whether the petitioner was subject to renegotiation as a "subcontractor" within the meaning and purview of said subsection (a)(5)(B).

STATEMENT OF THE CASE

Renegotiation proceedings for the years 1943 and 1944 were initiated by the Navy Department against the petitioner as a subcontractor within the meaning and purview of Subsection 403(a)(5)(B) of the Renegotiation Act of 1943 (R. 110).

Petitioner contested said renegotiation on the ground that he is a bona fide commission salesman, engaged in selling to commercial concerns only, and does not come within the category of persons which said subsection of the Act was specifically designed and intended by Congress to embrace, namely, the so-called war brokers or Washington Agents engaged in the procurement for their principals of Government contracts or subcontracts.

The petitioner has been a salesman of steel products for more than 35 years. He began his career with a training course at Bethlehem Steel Company, where he learned the different methods of production and familiarized himself with steel products and the various uses to which they are put. For several years he continued in the employment of the Sales Department of that Company, specializing in the sale of drop forgings, steel castings and pig iron (R. 89-91).

In about 1926 he went into business for himself as a sales representative of companies producing drop forgings and steel castings. He opened an office in New York City and since about 1933 he has acted as a sales representative on a commission basis of concerns manufacturing steel forgings and castings, including Endicott Forging & Manufacturing Company of Endicott, New York, maker of drop forgings, Hartford Electric Steel Corporation of Hartford, Conn., producer of carbon steel castings and Cooper Alloy Foundry Company of Hillside, New Jersey, maker of fine steel alloys, including stainless steel, Monel metal and nickel castings (R. 88, 91-93).

Petitioner's territory has always covered the Metropolitan area of New York, including Long Island, northern New Jersey, eastern New York and western New England (R. 91-93). He has one employee, a secretary-stenographer and pays all his own expenses. He assumes no credit risks and all billings and collections are handled by his principals (R. 88, 94, 142, 143).

Petitioner performs the usual duties of a commission salesman. He calls on customers, endeavors to maintain their good-will, ascertains their requirements and secures, if possible, purchase orders for his principals' products (R. 94). If he makes a sale it is evidenced by a printed order form. The order itself usually develops from a request by the customer for a quotation for making a desired article. The plant then estimates the cost of the work based on material and labor costs and other pertinent factors. The price is then quoted to the customer and, if the quotation is satisfactory, the order is placed. In connection therewith it is necessary to obtain such details, specifications or blue prints as may be required to execute the order (R. 131, 149).

Petitioner follows up the orders, endeavors to adjust complaints and reports to his principals any questions regarding the filling of orders, delivery dates, substitution of materials or other difficulties (R. 94, 95, 150-151).

Petitioner's employment contracts with his principals have always been oral. He is not a graduate engineer and does not perform any engineering or technical services for his customers and has no contract or arrangement with his principals to do so (R. 102).

The principal and largest customers served by petitioner and his employers include such concerns as General Electric, American Car & Foundry, Worthington Pump & Machinery Company, Chicago Pneumatic Tool Company, Bigelow Carpet Company, Wright Aeronautical, International Paper Company, and many other manufacturing concerns located in his territory (R. 148, 220). He has

been selling to most of his customers for long periods of time, extending in some instances as far back as thirty years (R. 97-98, 100).

Petitioner's compensation is strictly on a commission basis and his earnings are based directly on the volume of sales as covered by the invoices each month (R. 135, 143).

His rate of commissions on sales of carbon steel products for Endicott Forging & Manufacturing Company, Hartford Electric and Roxbury Steel was approximately 5%. His commissions on sales of fine steel alloys for Cooper Alloy Foundry Company ranged from about 5 to 10% (R. 155, 195, 198, 199). A substantial part of the commissions petitioner received in 1943 and 1944 was on sales that had a war-end use and approximately 87% of such commissions were earned at a rate of not exceeding 5% (R. 195, 199).

During the years in question, petitioner did not solicit or attempt to procure for his principals any Government business nor was he ever instructed by them to do so. He did not call on or communicate with any representative or any employee or official of any Government Department or any Agency of the United States Government in the effort to secure business for his principals from such persons. He had no understanding with any of his principals that it was part of his job to call on any such Agencies or procurement officers. His compensation was not conditioned on his getting such orders or making sales to any Governmental Departments or Agencies. He had no Washington Office and never went to Washington on business (R. 108, 114-115, 118, 131, 132, 161, 177, 179).

It was petitioner's duty to solicit business from his regular customers only and most of the business he brought in was produced from them. He sold only to commercial concerns and it was no part of his duties to solicit business from anyone other than commercial concerns (R. 148, 168, 178-179, 185).

Each of petitioner's principals was renegotiated for the years 1943-1944 (R. 162, 179, 187). Each of said principals reported the commissions which had been paid to petitioner as part of its selling expenses in accordance with the system of cost accounting regularly employed by the company (R. 172, 179, 187). Said commissions were not disallowed, reduced or excepted to in any way (R. 163, 180, 187, 188).

The above statements of fact are consistent with the pertinent findings of fact by the Tax Court (R. 55-60) as adopted by the Court of Appeals.

Petitioner appealed to the Tax Court for redetermination *de novo* of "unilateral determinations" by the Navy Department of excess profits alleged to have been received by petitioner during the years 1943 and 1944, respectively. The Tax Court found that during the years in question the petitioner had realized excessive profits of $22,500 and $6,750, respectively, without application of tax credits. Upon petition to the Court of Appeals for a review of the decisions of the Tax Court said decisions were, by per curiam opinion of the court, affirmed (R. 240).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is of major importance to innumerable sales representatives throughout the country engaged in selling, on a commission basis, their principal's products which may have a so-called war-end use. The seriousness of the decision becomes apparent in view of the situation generated by the Korean war and the resultant war production and by the inclusion in the Renegotiation Act of 1951 of a provision almost identical with subsection (a)(5)(B) of the Act of 1943 (subsection 1213(g)(3), Renegotiation Act of 1951; 50 U. S C. A. Appendix, sections 1211-1233.

2. The broadening of this statutory provision to include bona fide commission salesmen should not be permitted unless clearly sanctioned by judicial interpretation. Unless such interpretation is had uncertainty and confusion will exist among thousands of commission salesmen throughout the country, and among their employers and those charged with the administration of the Renegotiation Act, as to whether or not such salesmen's earnings are subject to renegotiation separately or as part of their principals' selling expenses. The question involved is one of substance and should be settled by this Court.

3. With deference and respect for the decision of the Court below, petitioner believes that objective weighing of the testimony before the Congressional Committees of those requesting the enactment of said subsection (a)(5)(B), the unequivocal statements made by the sponsors of the legislation and in the Reports of the House and Senate Committees, impel one to conclude that it was the clear intent and avowed purpose of Congress to incorporate said subsection into the Act for the sole purpose of subjecting to renegotiation so-called war-brokers or Washington agents by classifying them as subcontractors. (See Appendix B, hereto annexed.) The legislative history of (a)(5)(B) is absolutely devoid of any reference to the intended application of said provision to bona fide commission salesmen.

4. The lower court erred, therefore, in not giving due consideration to the numerous categorical expressions made by those persons directly concerned with the enactment of the measure, particularly the Committee Chairmen. (See Appendix B, pages 35 to 37.) Such statements clearly reveal the specific purpose and design of the legislation and are important guides to construction. As this court recently said in *Schwegmann Brothers* v. *Calvert Distillers Corporation,* 341 U. S. 384, at page 394:

"It is the sponsors that we look to when the meaning of the statutory words are in doubt."

5. Admittedly, the purchase orders secured by petitioner were subcontracts as defined in subsection (a)(5)(A) of the Renegotiation Act of 1943. Under the law, those were subcontracts held by petitioner's principals. Said principals, and not the petitioner, were the subcontractors. It is contended that petitioner's commissions derived from such sales orders were properly renegotiable as part of his principals' selling expenses. The lower court was thus in error in failing to give weight to the fact that in the renegotiation proceedings instituted against petitioner's principals, the commissions paid to petitioner were properly reported by his principals as part of their selling expenses and were not excepted to, reduced or disallowed in any way by the renegotiating authorities. The decision of the court below, in also subjecting petitioner personally to renegotiation, is at variance with the administrative interpretation of the Act and enlarges and extends the provisions of subsection (a)(5)(B) to a scope not justified by the language used in the light of its legislative history.

6. The sole authority relied upon by the Tax Court is *Providence Wool Combing Company* v. *Secretary of War*, 14 T. C. 979. That case had to do only with the interpretation of said subsection (a)(5)(A) and had no bearing whatever on the question of coverage presented herein under subsection (a)(5)(B). If, as the court below seemed to hold, the coverage of (a)(5)(A) was broad enough to include the activities of this petitioner, then the enactment of (a)(5)(B) was entirely unnecessary. It is elementary that Congress does not enact legislation unnecessarily.

7. As this court observed in *Lichter* v. *U. S.*, 334 U. S. 742, at page 787; the recovery by the Government of ex-

cessive profits under the Renegotiation Act is in the nature of the regulation of maximum prices under war contracts or the collection of excess profit taxes. In this controversy petitioner stands in the position of a tax-payer. In *Gould* v. *Gould,* 245 U. S. 151, 153, the Court re-emphasized the established rule that tax laws are not to be extended by implication nor enlarged to embrace matters not specifically pointed out and, in case of doubt, are to be construed most strongly against the Government and in favor of the citizen. (See also *U. S.* v. *Merriam,* 263 U. S. 179.) Any departure from this strict rule of construction to the prejudice of Constitutional guarantees cannot be justified by claimed war-time exigencies. *Ex Parte Milligan,* 4 Wall 2; *U. S.* v. *Hirabayashi,* 320 U. S. 81, 110. Therefore, the decision of the Court below is at variance with important decisions by this Court and it is in the public interest that the scope of subsection (a)(5)(B) of the Renegotiation Act of 1943 be now re-surveyed and clearly marked by this court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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